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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

FRESNO HERNDON INVESTORS, LLC, et al.,

Plaintiffs and Respondents,

v.

TARIQ MIRZA et al.,

Defendants and Appellants.

F065078

(Super. Ct. No. 09CECG04547)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Carlos A. Cabrera, Judge.

Law Office of Sydney Jay Hall and Sydney Jay Hall for Defendant and Appellant Tariq Mirza.

Gilmore, Wood, Vinnard & Magness, David M. Gilmore and William H. Leifer for Plaintiff and Respondent Fresno Herndon Investors, LLC.

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* Before Wiseman, Acting P.J., Kane, J. and Detjen, J.

In this action for breach of a commercial lease, defendant Tariq Mirza (Mirza) failed to appear at the trial of the case. The trial court proceeded to hear the matter and a judgment was entered against Mirza and in favor of plaintiffs Fresno Herndon Investors, LLC (Fresno Herndon) and Miller Family, LLC.¹ Months later, Mirza moved to vacate the judgment under Code of Civil Procedure section 473² on the ground that he did not receive notice of the trial date and/or that his failure to monitor the case was a result of excusable neglect. The trial court denied the motion. Mirza appeals, contending the trial court abused its discretion. We disagree and affirm the order below.

FACTS AND PROCEDURAL HISTORY

On October 22, 2009, plaintiffs filed an unlawful detainer complaint against the two tenants specified in the lease—to wit, defendants Pacific Realty Partners, Inc., a California corporation (Pacific Realty) and Tariq Mirza, an individual. Defendants allegedly entered into a five-year commercial lease, but within a short time after the lease term commenced on July 1, 2009, failed to pay monthly rent. A copy of the lease was attached as an exhibit to the complaint. The lease included a place for the signatures of the parties, and it was apparently signed by both of the tenants, including the signature of “Rick Mogul” as “CEO” on behalf of Pacific Realty, and that of Tariq Mirza as an individual. Shortly after the unlawful detainer complaint was filed, defendants surrendered possession of the premise[s] to plaintiffs and/or disclaimed any possessory right thereto. Mirza stated in an email to plaintiffs’ counsel, William Leifer: “I agree to giving up possession of the premises immediately.”

On December 8, 2009, plaintiffs filed a first amended complaint seeking to recover rental amounts due under the lease, including future rents. As with the original

¹ Fresno Herndon is the sole plaintiff/respondent herein.

² Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

complaint, the first amended complaint attached a copy of the lease as an exhibit. The first amended complaint alleged that defendants were obligated to pay plaintiffs the sum of \$628,773.83 as rent or damages based on rental amounts attributable to the entire five-year period of the lease term, plus attorney fees and costs incurred in the action.

On March 23, 2010, Mirza filed an answer to the first amended complaint. Mirza was not represented by an attorney but was self-represented. Pacific Realty did not file an answer and default was entered against Pacific Realty on June 6, 2010.

A case management conference (CMC) was held in the trial court on July 19, 2010. Mr. Leifer appeared at the CMC on behalf of plaintiffs, but Mirza did not appear. The record does not reflect that Mirza was notified by the trial court of the date and time of the CMC.³ However, on July 23, 2010, the court clerk mailed to Mirza the *results* of said CMC. Specifically, the CMC minute order mailed to Mirza clearly stated as follows: “Trial is set for 9-16-11 at 8:30 a.m. in ... Kingsburg.” The same CMC minute order included the clerk’s certificate of mailing showing that the document was mailed to Mirza.

On September 16, 2011, the trial court called the case to commence trial. Plaintiffs were present through Mr. Leifer. Mirza was not present. The trial court proceeded to hear the matter and entered a judgment against Mirza in the amount of \$645,328.31. On September 19, 2011, the clerk mailed to Mirza a copy of the minute order from the September 16, 2011 trial, as well as a copy of the judgment. A written notice of entry of judgment was served on Mirza by plaintiffs and was filed on September 22, 2011. Mirza did not appeal from the judgment.

³ The July 19, 2010, CMC was scheduled as a continuance of prior CMC’s held on June 7, 2010, and April 5, 2010. Although Mirza filed his answer in March 2010, the record on appeal does not show the clerk mailed him advance notification of these CMC’s.

Mirza's Motion for Relief Under Section 473

On January 23, 2012, Mirza, having obtained the representation of an attorney, filed his motion to vacate or modify judgment pursuant to section 473. The motion to vacate was made on the ground that Mirza did not receive notice of the trial date and, additionally, that his failure to carefully monitor the case was excusable under all of the circumstances. In his declaration in support of the motion, Mirza stated he was and is a physician working a very busy schedule, seeing patients “in nine different cities ranging from Oakland to San Francisco to San Jose to Modesto to Los Angeles.” Despite this busy schedule, his normal practice was to review his mail every evening when he got home. He stated: “I realize that the July 19th Case Management Minutes had a ‘Clerk’s Certificate of Mailing’ attached to it indicating that the document was mailed to me at my home in Union City. I have no explanation for it, but am certain that I never personally received this document.” He said that it was possible one of his five children or his wife could have misplaced it. He noted that his wife had a medical condition that made her mentally confused at times. He noted further that when he received a prior notice to appear for a court hearing in November or December 2009 relating to the unlawful detainer, he did in fact appear only to find out the hearing had come off calendar. After filing his answer on March 23, 2010, he believed that if anything further was required of him (e.g., an upcoming hearing or trial), he would receive a notice or request of some type from opposing counsel or the trial court. However, “during the next eighteen months, other than a notice regarding a default against Pacific Realty, I received nothing about the case until I got copies of the papers regarding the judgment entered against me in September 2011—no emails, phone calls or letters, no notices or legal documents, nor any other communications of any type from either Mr. Leifer or the Court.”

Mirza’s declaration explained that these circumstances lulled him to believe the case was being resolved without his participation: “Because of the apparent inactivity in the case, my earlier experience appearing for a hearing that, unknown to me, had been

taken off calendar, and because of my certainty that I had no responsibility under the subject lease and that the case was directed at Pacific Realty, I mistakenly assumed that the case was being resolved without me. As a result, I never retained an attorney and neglected to investigate the actual status of the case.” Mirza noted further that he had specifically informed plaintiffs’ property manager in the fall of 2009 that “the signature on the subject lease [was] most definitely not mine.” As confirmation that plaintiffs were aware of his assertion that the signature was forged, Mirza attached an email received in November 2009, wherein Mr. Leifer acknowledged that Mirza was asserting the signature was a forgery. In asking for relief under section 473, Mirza stated he did not believe it was fair that he be held responsible for Pacific Realty’s obligations. Finally, Mirza’s declaration set forth alleged calculation errors in the amount of the judgment to support his alternative request that the trial court modify the judgment.

On February 7, 2012, plaintiffs filed their opposition to the motion. In their opposition, plaintiffs took the position that Mirza failed to show grounds warranting relief from the judgment under section 473. The opposition papers included the declaration of Garry Owens, who was in charge of leasing and managing office space for plaintiffs, including the office space leased by defendants. He also was involved in negotiating the terms of that lease. Owens stated in his declaration that because of the nature of the company seeking to rent the office space, plaintiffs “required ... Tariq Mirza to be added as a tenant as it was represented to [Owens] by Rick Mogul, the CEO of defendant Pacific Realty ... that defendant Mirza was an investor and participant in the company.” Owens was provided “financial information for defendant Mirza from Rick Mogul, including a tax return for defendant Mirza.” Owens also called Mirza’s home and Mirza’s wife answered; she explained that Rick Mogul was their son.

The opposition papers also included the declaration of Mr. Leifer, who stated that one week prior to the writ of attachment hearing in November 2009, he emailed Mirza to inform Mirza that said hearing was off calendar. This evidence was offered to discredit

Mirza's assertion that he made an appearance in court for that hearing only to discover upon his arrival that it was off calendar. Mr. Leifer also noted that Mirza's claim that he received nothing to alert him to the existence of the CMC hearings was not entirely correct, because Leifer's office had mailed to Mirza copies of Leifer's request for CourtCall appearance concerning both the June 7, 2010, and the July 19, 2010, CMC hearings. The documents stated that they related to CMC hearings in the case and the date of the upcoming CMC hearings was plainly stated thereon.

Mirza's reply was filed on February 16, 2012. In a supplemental declaration, Mirza stated he did not recall receiving the email referred to by Mr. Leifer. Mirza said it appeared Leifer's email may have been sent to an attorney by the name of Weiss, who was not representing him. As to the CourtCall documents, Mirza stated those documents did not have his name on them and did not appear to have any particular significance with respect to him. As to the fact that Mr. Owens had a copy of Mirza's income tax return, he claimed to have "no idea" how that document ever came into Owens's possession. The reply did not respond to Owens's statement that he was told by Mirza's wife that Rick Mogul was their son; instead, the reply simply objected to such evidence on the ground of hearsay.

The motion to vacate or modify the judgment pursuant to section 473 was heard on February 24, 2012. Following oral argument, the motion was taken under submission by the trial court. On April 3, 2012, the trial court issued its order denying Mirza's motion to vacate or modify the judgment. The order explained: "[T]he court finds that defendant Mirza's neglect of this action against him was a conscious and voluntary choice and does not constitute excusable neglect pursuant to ... Section 473[, subdivision](b). There was no reasonable excuse for defendant Mirza not to appear at the trial and not to inquire about the status of the litigation when he received various notices from the plaintiff. Mirza's statement that since he felt he was not liable, he thought the settlement of the case would proceed without him, is unrealistic and

unreasonable. [¶] Defendant Mirza’s alternative motion to adjust the amount of the judgment is denied because the court issued the judgment based on sworn testimony of the plaintiff. The time to contest the amount would have been at the trial and not after the fact.”

Mirza timely filed his notice of appeal from the order.

DISCUSSION

I. Section 473 and Standard of Review

A motion for relief from a judgment, order or other proceeding may be made on the ground that it was taken against the moving party as a result of mistake, inadvertence, surprise or excusable neglect. (§ 473, subd. (b).) Additionally, the trial court may at any time set aside a void judgment or order. (§ 473, subd. (d).) A judgment or order is void if it was entered without adequate notice to the affected party. (*Moghaddam v. Bone* (2006) 142 Cal.App.4th 283, 288-289 [incorrect address of service of notice—resulting order void]; *Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1286; *Reid v. Balter* (1993) 14 Cal.App.4th 1186, 1194 [dismissal void where entered without notice to the plaintiff].)

A motion seeking relief under section 473 lies within the sound discretion of the trial court, and the trial court’s decision will not be overturned absent an abuse of discretion. (*Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233 (*Elston*).) Section 473 is applied liberally where the party moves promptly to seek relief and no prejudice will be suffered by the party opposing the motion if relief is granted. In such instances, only very slight evidence is needed to justify relief. (*Elston, supra*, at p. 233; *Rogalski v. Nabers Cadillac* (1992) 11 Cal.App.4th 816, 819-820.) Additionally, because the law favors trial on the merits, doubts are to be resolved in favor of the party seeking relief. As a result, a trial court order denying relief is more closely scrutinized on appeal than an order permitting trial on the merits. (*Elston, supra*, at p. 233.)

II. No Abuse of Discretion Shown

The trial court found that Mirza failed to establish excusable neglect or other grounds for relief under section 473. The order is presumed correct and the burden is on Mirza, as appellant, to demonstrate that the trial court abused its discretion. (*Lint v. Chisholm* (1981) 121 Cal.App.3d 615, 620; *Transit Ads, Inc. v. Tanner Motor Livery, Ltd.* (1969) 270 Cal.App.2d 275, 278.) As we explain, Mirza has failed to meet that burden.

To warrant relief under section 473, a litigant's "neglect must have been such as might have been the act of a reasonably prudent person under the same circumstances." (*Elms v. Elms* (1946) 72 Cal.App.2d 508, 513; *Lint v. Chisholm, supra*, 121 Cal.App.3d at p. 620.) Furthermore, "It is the duty of every party desiring to resist an action or to participate in a judicial proceeding to take timely and adequate steps to retain counsel or to act in his own person to avoid an undesirable judgment. Unless in arranging for his defense he shows that he has exercised such reasonable diligence as a man of ordinary prudence usually bestows upon important business his motion for relief under section 473 will be denied." (*Elms v. Elms, supra*, at p. 513.) "The law frowns upon setting aside default judgments resulting from inexcusable neglect of the complainant." (*Ibid.*; accord, *Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1206; *Davis v. Thayer* (1980) 113 Cal.App.3d 892, 907.) "Where the default occurred as a result of a deliberate refusal to act, and relief is sought after a change of mind, the remedy is clearly inappropriate. [Citations.]" (8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 158, p. 754; *Davis v. Thayer, supra*, at p. 907.)

Here, the record adequately supports the trial court's conclusion that Mirza's neglect was inexcusable. The first amended complaint, to which Mirza filed an answer, clearly asserted that both Pacific Realty and Mirza were liable to plaintiffs for more than \$600,000 in rent or rental damages. Additionally, such substantial liability was asserted against Mirza in the first amended complaint after the time that Mirza allegedly told

plaintiffs' agent that he never signed the lease. In light of these facts, Mirza could not reasonably sit back and assume that plaintiffs were going to proceed solely against Pacific Realty or that the case "was being resolved without [him]." Moreover, not only was Mirza subject to a substantial risk of liability under the first amended complaint, but he continued to receive filings and papers in the case that should have alerted him to the fact that the case was proceeding. For example, approximately one month after Mirza received notice of the entry of Pacific Realty's default, plaintiffs served on Mirza their request to make a CourtCall appearance for the (then) upcoming CMC hearing set for July 19, 2010. Despite these circumstances, Mirza failed to take any steps to protect his interests or act with reasonable diligence. He did not consult with an attorney or make even a minimal inquiry of the court or counsel regarding the status of the case.⁴ Instead, he unreasonably assumed it would somehow be resolved without his involvement. Mirza's inattention regarding the case reflected a lack of ordinary diligence concerning the litigation, even though much was at stake. The trial court did not abuse its discretion in concluding that Mirza's neglect was inexcusable.

As to the statement by Mirza that he did not "personally" receive the CMC minute order giving notice of the trial date, and his further suggestion that perhaps a family member at his home misplaced it when it arrived, the trial court implicitly found Mirza was not credible. The July 19, 2010, CMC minute order setting the trial date included a clerk's certificate of mailing showing it was mailed to Mirza.⁵ Moreover, in light of

⁴ It appears that no effort was made by Mirza to inquire as to the status of the case between the time he filed his answer in March 2010 and the time judgment was entered in September 2011, a period of about 18 months.

⁵ A clerk's certificate has the force and effect of an affidavit. (§ 2015.3.) The trial court was entitled to conclude, as a reasonable inference from all the evidence, that Mirza received the CMC minute order notifying him of the trial date. (See, e.g., Evid. Code, §§ 604, 641.)

Mirza's inattention to and neglect of the case, along with the fact that other court filings mailed to Mirza's address were received by Mirza, we are unable to conclude on the record before us that the trial court abused its discretion.⁶

Plaintiff notes that an additional basis for affirming the trial court's denial of relief was Mirza's unexplained delay in bringing the motion.⁷ Section 473, subdivision (b), requires that a motion for relief must be made "within a reasonable time, in no case exceeding six months, after the judgment, dismissal order, or proceeding was taken." The reasonable time requirement means that "the moving party must show diligence in making the motion after discovery of the default." (8 Witkin, Cal. Procedure, *supra*, Attack on Judgment in Trial Court, § 178, p. 777; *Kendall v. Barker* (1988) 197 Cal.App.3d 619, 625.) Thus, where a party has filed a motion for relief after an extended delay without an adequate excuse, it is an abuse of discretion for a trial court to grant relief under section 473. (*Stafford v. Mach* (1998) 64 Cal.App.4th 1174, 1183.) "Absent an explanation of the delay in bringing his motion to set aside the default, the court could not excuse and set the default aside as it was not empowered to dispense with the 'reasonable time' requirement. [Citations.]" (*Conway v. Municipal Court* (1980) 107 Cal.App.3d 1009, 1019.) For example, in *Benjamin v. Dalmo Mfg. Co.* (1948) 31 Cal.2d 523, 529, 531-533, the Supreme Court reversed the trial court's order granting relief where the party's attorney knew of the default but waited over three months to file the motion without any explanation for the delay.

⁶ At oral argument, one of the arguments presented by plaintiffs' counsel was that Mirza could not have reasonably assumed the case was inactive or had settled because, among other things, Rick Mogul (Pacific Realty's CEO) was Mirza's son. Mirza's attorney objected to the evidence that Mogul was Mirza's son. The trial court did not sustain the objection, but indicated it would not rely on that evidence.

⁷ The trial court did not reach the issue of delay, since it concluded Mirza failed to show excusable neglect or other grounds for relief.

Here, Mirza learned in September 2011 that the judgment had been entered against him, but his motion for relief under section 473 was not filed until January 23, 2012, approximately four months later. The moving papers contained no explanation for the delay, and Mirza's declaration merely stated he did not retain an attorney until "late November 2011." Mirza's reply declaration vaguely added that there was a prior, unnamed attorney that he had contacted, but that person decided not to take the case. A partner of the law firm eventually retained by Mirza submitted a declaration stating he was personally very busy in November and December of 2011, but no reason was given why other members of the same firm could not have handled the matter. On this record, we agree with Fresno Herndon that there was no showing made of diligence or excuse for the delay in bringing the motion, which fact further supported and even necessitated the trial court's denial of relief.

III. Judgment Not Before Us

Mirza attempts to raise matters relating to the conduct of the trial or the evidence considered by the trial court in support of the judgment below. Such matters are not properly before us. A timely notice of appeal from the judgment had to be filed within 60 days of notice of entry of judgment. (Cal. Rules of Court, rule 8.104(a)(1).) Mirza did not file an appeal from the judgment, but after the time for appeal had expired, Mirza moved to vacate the judgment pursuant to section 473. Accordingly, the only issue properly before us is whether the trial court abused its discretion in denying that motion. Therefore, we do not consider Mirza's arguments regarding the conduct of the trial or the propriety or adequacy of the evidence relied upon by the trial court when it heard the trial and rendered the judgment below.

DISPOSITION

The order of the trial court is affirmed. Costs on appeal are awarded to Fresno Herndon.